New Nouveau Brunswick

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Law Reform Notes

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Law Reform Notes is produced in the Legislative Services Branch of the Department of Justice, and is distributed to the legal profession in New Brunswick and the law reform community elsewhere. Its purpose is to provide brief information on some of the law reform projects currently under way in the Branch, and to ask for responses to, or information about, items that are still in their formative stages.

Law Reform Notes #9 is appearing later than originally planned. It was delayed initially in order to co-ordinate its distribution dates better with the revised timings of the Legislative Assembly's sittings. It was then delayed again to ensure that it was circulated during the consultation period for the recently released Privacy: Discussion Paper #2. In the fall, however, we hope to return to our regular twice yearly publication schedule.

The Department is grateful to all of those who have commented on items in earlier issues of Law Reform Notes; we encourage others to do the same. We also repeat our suggestion that, if any of our readers are involved either professionally or socially with groups who might be interested in items discussed in Law Reform Notes, they should let those groups know what the Department is considering and suggest that they give us their comments. We are unable to distribute Law Reform Notes to everybody who might have an interest in its contents, for these are too wide-ranging. Nonetheless we would be pleased to receive comments from any source.

A: UPDATE ON ITEMS IN PREVIOUS ISSUES

1. Privacy

In Law Reform Notes #7 we reported that a discussion paper had been submitted to the Legislative Assembly's Law Amendments Committee, making recommendations for legislation to govern the collection and use of personal information by the provincial government. In Law Reform Notes #8 we mentioned that the Committee had approved the substance of the discussion paper, and had also recommended that a further discussion paper be prepared, examining the extension of privacy legislation to the private sector. Two developments have flowed from this.

First, in February 1998 the Protection of Personal Information Act was enacted. This Act establishes a Statutory Code of Practice that is to be followed by the provincial government in its collection and use of personal information. The Act is subject to proclamation. The preparatory work that will lead to proclamation has just begun.

Second, in May 1998 the Department of Justice filed with the Clerk of the Legislative Assembly a document entitled Privacy: Discussion Paper #2. This is the additional discussion paper that the Law Amendments Committee recommended. It, too, has been referred to the Committee for review.

The Paper is in two Parts. Part I is entitled Data Protection in the Private Sector. It asks whether legislation similar to the Protection of Personal Information Act is required for the

private sector, and if so, what it should say. The Paper uses the Canadian Standards Association's Model Code for the Protection of Personal Information as the basis of its discussion. The CSA Code is also the basis of the Statutory Code of Practice under the Protection of Personal Information Act.

Part II of the discussion paper looks at Privacy in General — which is a much broader subject than merely the protection of personal information. The Paper asks whether legislation is required establishing either new judicial remedies or new non-judicial remedies for infringements of privacy. Discussion of possible judicial remedies centres upon the possibility of establishing an invasion of privacy as a specific tort. The Uniform Privacy Act prepared by the Uniform Law Conference of Canada is examined as a possible model. Discussion of possible non-judicial remedies asks whether an administrative agency might be given a role in protecting the privacy of New Brunswickers, and if so, what the mandate and powers of such an agency might be.

If legislation along the lines discussed in the paper were adopted it would affect many interests. The CSA Code, for example, which is the focus of Part I, is expressed as applying to all kinds of information about identifiable individuals, whether or not the information is sensitive, and to all kinds of "organizations," which the Code describes as including "associations, businesses, charitable organizations, clubs, government bodies, institutions, professional practices, and unions." Part II, which deals with the inevitably open-ended concept of infringments of privacy, is potentially broader still, though less explicit in its impact. With legislation of such wide potential scope under review, we hope that there will be some interesting presentations at the public hearings that are expected to be held.

Copies of the discussion paper can be obtained from the Clerk of the Legislative Assembly or on the Internet at http://www.gov.nb.ca/legis/comite/priv-ii/index.htm. Anyone wishing to comment on the paper is advised to let the Clerk know of their interest. No date had been set for the Law Amendments Committee's hearings by the time these Notes were prepared.

2. International Wills Act

This Act came into force on June 1st, 1998. The Act establishes a form of will that will be recognized by all the countries that have ratified the Convention Providing a Uniform Law on the Form of an International Will.

3. Out-of-Province Judgments

Two Bills were introduced in the Legislative Assembly this year that are designed to simplify the enforcement of money judgments given by courts outside the province. These are the Canadian Judgments Act and An Act to Amend the Reciprocal Enforcement of Judgments Act. Both Bills were before the Committee of the Whole when the House adjourned.

If enacted in its present form, the Canadian Judgments Act would become the primary method for the enforcement of money judgments from other Canadian territories and provinces. The general principle of the Bill is that money judgments coming from other Canadian provinces and territories should be recognized and enforced here on a basis of 'full faith and credit'. The Bill contains provisions, however, under which special provision may be made for default judgments. If the Bill is enacted in its present form, we anticipate that there will be further consultation on the need for, and nature of, any such further provision.

The proposed amendment to the Reciprocal Enforcement of Judgments Act would change the focus of the Act. At present the Act applies to judgments coming from Canadian courts, but this function would be overtaken by the proposed Canadian Judgments Act. The amendment, therefore, would permit reciprocal arrangements to be made with foreign jurisdictions rather than with Canadian ones.

B. NEW ITEMS

4. S.43.3, Evidence Act

Representatives of the hospital and medical communities have suggested to us that s.43.3 of the Evidence Act needs amendment in the light of the Court of Appeal's decision in Doyle v Green 182 N.B.R.(2d) 341. S.43.3 establishes a privilege in relation to what are sometimes known as hospital quality assurance programs. In Doyle v Green a hospital corporation claimed privilege for a large number of documents at discovery proceedings. It relied both on s.43.3 and on the common law as set out in Slavutych v Baker [1976] 1 S.C.R. 254. Its claims under s.43.3

failed. Under the common law it had mixed success, but the documents most directly related to the incidents in issue were ordered to be disclosed.

The concern that has been expressed to us is that s.43.3, as it has now been interpreted, is too narrow to ensure the integrity of the quality assurance process. More specifically, the concern is that Doyle v Green may make the opinions that doctors and others offer during the quality assurance process liable to disclosure. The request is that the Evidence Act be amended so that opinions are clearly protected.

A major feature of Doyle v Green is a distinction that the Court draws between "investigations" and the process that attracts privilege under s.43.3(2)(b). That paragraph protects documents arising out of any "study, research or program, the dominant purpose of which is medical education or improvement in medical or hospital care or practice." For the Court, when the hospital launched an investigation in response to some "apparent common disasters to certain patients," it could not be said that its "dominant" purpose was the one described in s.43.3(2)(b). The statutory privilege therefore did not apply.

Hospital and medical representatives are concerned that this approach undermines the quality assurance process. As they describe it, looking into things which may have gone wrong -- whether major or minor -- is an important and integral element of the process contemplated in s.43.3, and it is both mistaken and counter-productive to exclude documented opinions from the protection of that section merely because they were given in the context of an identified problem that the hospital was consciously trying to investigate and resolve.

Setting aside for the time being the legal details, the question of substance here is this: should the opinions that are expressed to hospital authorities when they are investigating things that have gone wrong in their hospitals be privileged from disclosure?

Arguably they should be. S.43.1 of the Evidence Act already protects "any part of an investigative report in which an opinion is expressed, regardless of the purpose for which that reportwas prepared," so there is precedent for the protection of opinions in the context of investigations. Add to this the policy of s.43.3, which is that special protection is needed for the confidentiality of proceedings to maintain standards of care in hospitals, and it may be seen as a short step to accept that opinions expressed during incident investigations in hospitals should be protected from disclosure, without having to go through the balancing of interests that would take place if the common law under Slavutych applied. This protection, it must be emphasized, would not extend to any facts that were discovered in the course of the investigation.

We would appreciate comment on this. We anticipate that amendments designed to achieve the effect described above may not be easy to draft, given the existing wording of s.43.1, s.43.3 and the terms of the judgment in Dovle v Green. At present, though, our concern is with the broad question of whether an amendment is appropriate rather than with the fine details of how it might be expressed.

5. Attorney for Personal Care

Sections 58.1 to 58.6 of the Property Act enable a person to grant a power of attorney that remains effective even though the donor of the power subsequently becomes mentally incompetent. The sections apply to property management decisions. We have received the suggestion that something similar should be put in place for personal care decisions. These would be decisions about things like place of residence, health care and personal activities – the kinds of issues that are dealt with by a committee of the person under the Infirm Persons Act.

Broadly speaking, it seems sensible that people should be able to decide who should iook after them if they become unable to look after themselves. There are times when it is important to know who has the authority to take a decision on an incompetent person's behalf, and one would think that the obvious candidate for that responsibility would be the person selected by the individual before he or she became incompetent. The combination of an 'attorney for personal care' with an enduring power of attorney for property matters should enable individuals to create by their own actions much the same result that the court creates under the Infirm Persons Act when it appoints a committee of the person and of the estate.

The enduring power of attorney under the Property Act also seems to provide a good model in terms of the general structure of possible 'attorney for personal care' provisions. Following that model, the appointment would be a fairly formal document – possibly a document under seal, but at least a document that is signed and witnessed and is clearly intended to take effect in the event of incapacity. The requirement of formality should help to ensure that people did not grant important powers without proper reflection.

The appointment could be more or less specific in setting out what the 'attorney for personal care' was supposed to do; this would be a matter for the donor of the power to determine. When the donor became mentally incompetent, and the power therefore became operative, the exercise of the power would be governed by the combined effect of terms of the power and the general duty of the attorney to act in the best interests of the donor.

In cases where the attorney was alleged to have failed in his or her duties, the Infirm Persons Act would provide the means by which he or she could be removed, and a committee of the person appointed. The provisions of the Family Services Act on abused or neglected adults might also be invoked in some cases in which the attorney's actions or inaction were considered unacceptable, but there was no one willing to take on the responsiblities of committee under the Infirm Persons Act.

We would welcome comment on the desirability and on the possible pitfalls of a scheme along the lines above. It does not, of course, cover all issues relating to personal care decisions for incompetent adults. It would only apply where an individual specifically expressed his or her wishes, and did so in a form that met the requirements of the legislation. Nonetheless, it does seem sensible that the law should provide a vehicle by which those people who want to make deliberate arrangements for their future personal care should be enabled to do so. Those who choose to exercise that option would be a little further ahead than they are under the existing law. Those who do not choose to do so would be no further behind.

6. Uniform Law Conference

The Uniform Law Conference of Canada will be meeting as usual in August. The Legislative Services Branch continues to participate in the work of the Conference. The items on the agenda this year are these:

a. Exigibility of Future Income Security Plans.

b. Data Protection Legislation.

c. International Convention on the Limitation Period in the International Sale of Goods.

d. Electronic Commerce.

e. Enforcement of Foreign Judgments.

f. Arbitration and Construction Liens.

g. Interprovincial Subpoenas.

h. Eurocurrency.

i. Unclaimed Intangible Property.

j. Transfer of Securities.

k. Report on Private International Law.

l. Negotiable Documents of Title.

m. Enforcement of Judgments.

n. Report from the U.S. National Conference of Commissioners on Uniform State Law.

Further information on any of these items can be obtained from this office. Information about some of these projects is also available through the Conference's Home Page, which is maintained under that of the Alberta Law Reform Institute at http://www.law.ualberta.ca/alri/

Responses to any of the above should be sent to the address at the head of this document, and marked for the attention of Tim Rattenbury. We would like to receive replies no later than August 7th 1998, if possible.

We also welcome suggestions for additional items which should be examined with a view to reform.